OFFICIAL OPINION NO. 70-47, Township contract for graveling highways; lease of gravel pit by township supervisor to contractee graveling township roads violates SOCL 8-9-2, but if within exception of SDCL 6-1-2, would still be a valid contract.

STATE OF SOUTH DAKOTA

OFFICE OF

THE ATTORNEY GENERAL

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Dear Mr. Wollman:

You have requested my opinion on this factual situation:

"X", a township supervisor of "B" Township, owns a gravel pit within the township. On January 2, 1970, he leased this gravel pit to "Y" for a period of two years. As a covenant of such lease, "Y" agrees to pay "X" fifteen cents per cubic yard for all materials removed from the gravel pit during the existence of such lease.

"Y" has agreed to gravel a designated township road in "B" Township and has been awarded a contract therefor by the Township Supervisors of "B" Township.

The questions you have submitted in connection with the factual situation are as follows:

1. Does SDCL 8-9-2 render the contract between the township and "Y" illegal and void if he in fact uses gravel for such township road work from the gravel pit leased from township supervisor "X"?

2. Would the provisions of SDCL 6-1-1 and 6-1-2 authorize the finding of such contract as a valid township contract notwithstanding the provisions of SDCL 8-9-2?

There seems little question that under SDCL 8-9-2 this contract would be illegal and void. SDCL 8-9-2 provides:

No township officer shall become a party to or interested directly or indirectly in any contract made by the township of which he is an officer; and every contract or payment voted for or made contrary to the provisions of this section is void. Any violation of this section shall be a malfeasance in office for which the officer so offending may be removed from office.

As this office said in 1919-20 AGR 410:

It will be observed from the language quoted that the Supreme Court of New York held that the penal section of the statutes of that state corresponding to Section 3816 of our Revised Code (now SDCL 3-16-7) must be strictly construed; and that the good faith of the officer, or the amount of the contract, or the fact that the interest may be indirect, may not be considered for the purpose of upholding a contract against this express provision of law.

The stated fact that this contract of lease of the gravel pit was not entered into until January 2, 1970, its comparative short term of two years, can lead only, to the conclusion that the motivating force behind such lease was the fact that the township supervisor could not lease this gravel pit to the township for its use, but that "Y" could enter into a contract with the township to gravel township roads, using gravel from the pit leased from "X", the township supervisor. "X" indirectly benefits from the payments for gravel to his lessee. Such arrangement and contract is violative of SDCL 8-9-2.

However, "spurred on" by the opinion of **Carlson v. Donnenwirth**(1954) 75 SD 432, 67 NW 2d 149, (the famous "City of Faith Case" where city councilmen furnishing coal at a fair and reasonable price to the City of Faith were required to reimburse the payment for such coal to the city) the Legislature an1eliorated the stiff, unfaltering statutes relative to public officers dealing with public bodies by the adoption of Chapter 206 of the Session Laws of 1955. As initially enacted, exceptions to the rigid "public officer's statutes" were authorized only for municipal officers. Such statute was amended by Ch. 254, Laws of 1957, and extended to cover "officers of a municipality, township, or school district." Other

modifications were thereafter made. Such enactment and amendments appear in SDCL6-1-1, 6-1-2 and 6-14.

SDCL 6-1-2 provides four exceptions if the contract was made without fraud or deceit. These exceptions are:

FIRST: A contract involving one hundred dollars or less, regardless of the source of supply and provided consideration therefore is reasonable and just;

SECOND: Contracts involving more than one hundred dollars but less than the amount of competitive bidding, and there is no other source of supply, and consideration is reasonable and just, and further provided the accumulated total of such con tracts do not exceed five thousand dollars during any given fiscal year.

THIRD: Any contract with a firm, association or corporation, for which competitive bidding is not required, but other sources of supply are available and the consideration therefore is reasonable and just, unless a majority of the governing body are collectively holders of a controlling interest in such firm, or any of them is an officer or manager of such firm,

FOURTH: Such was a contract with a firm, association, corporation or cooperative association for which competitive bidding is required, and where more than one such competitive bid is submitted.

Under the facts given, it is most difficult to see the applicability of exceptions 1 through 3. Only exception 4 seems applicable, and, of course, I have not been properly advised whether or not the award of such graveling contract to "Y" was made to him in his individual, or firm name, as a result of competitive bidding which resulted in the filing of more than one bid, and the bid of "Y" was the bid of the "lowest responsible bidder."

However, it seems beyond dispute that if SDCL 6-1-2(4) is complied with, (a bid in a "firm name," more than one competitive bid was submitted and the award of the contract to "Y") this is not an award of a contract fraught with "fraud and stealth," but rather such is a valid contract by virtue of statutory enactments passed by the Legislature and approved by the Governor subsequent to the enactment of SDCL 8-9-2. Being a subsequent enactment, insofar as the particular problem in regard to competitive bidding is concerned, SDCL 6-1-2(4) is the controlling law. Compliance with it would result in a valid contract.

Question 2 is answered in conformity with the previous discussion of the appropriate statutes. It seems redundant to suggest that if the conditions of SDCL 6-1-2(4) (or any of the previous three exceptions) are not complied with, that it makes little difference if it is found that SDCL 8-9-2 or 6-1-1 apply, for the proper reason that such contact would be illegal and void under either statute.

Respectfully submitted,

Gordon Mydland
Attorney General